Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	

COMMENTS OF CBEYOND, INC., INTEGRA TELECOM, INC., ONE COMMUNICATIONS CORP., AND TW TELECOM INC.

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Cbeyond, Inc. ("Cbeyond"), Integra Telecom, Inc. ("Integra"), One Communications Corp. ("One Communications"), and tw telecom inc. ("tw telecom") (collectively, the "Joint Commenters"), through their undersigned attorneys, hereby submit these comments in response to the *Notice of Inquiry*[1] in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

As the *Notice* recognizes,[2] the promotion of broadband services to business customers should be a central component of the national broadband plan. These comments discuss both the general principles that should guide the Commission as it undertakes development of a national broadband plan and the steps that the Commission should take to spur innovation and investment in the provision of business broadband services in particular.

The general principles that should guide the FCC in its national broadband plan are straightforward. Since it is widely accepted that markets yield the most efficient outcomes, the

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[1] *In re A National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51 (rel. Apr. 8, 2009) ("*Notice of Inquiry*" or "*Notice*").

[2] *See id.* ¶ 5 ("Our goal must be for . . . every American business to have access to robust broadband services."); *see also id.* ¶ 8 (listing "large and small businesses" among the key stakeholders in the development of a national broadband plan).

Commission should rely on markets where possible to drive deployment, innovation and lower prices in the provision of broadband, especially business broadband. Where markets alone do not yield sufficient deployment, innovation and affordability, the FCC should rely on regulations that lower barriers to competitive entry. Finally, if the FCC determines that there are circumstances in which broadband must be subsidized, it should utilize narrowly tailored subsidies targeted at residential customers that cannot afford broadband.

Unfortunately, the Commission has a great deal of work to do to identify and rectify situations in which markets alone cannot be relied upon to yield sufficient deployment, innovation and affordability in the business broadband market. For far too long, the FCC has utilized an incoherent hodge-podge of standards and predictions to determine the circumstances in which to apply regulations that lower barriers to competitive entry in the provision of business broadband services. This policy has resulted in reduced competitive entry, high prices, and stunted deployment. To fix this problem, the FCC must reassess entirely its regulatory framework for business broadband by, among other things, (1) establishing meaningful regulation of the rates, terms and conditions under which incumbent LECs provide special access services; (2) adopting an analytical framework for the consideration of petitions for forbearance from unbundling requirements under which such requirements would not be eliminated in the absence of meaningful facilities-based competition to the incumbent LEC in the relevant product and geographic markets; (3) establishing rules to prevent incumbent LECs from unilaterally retiring copper loop facilities, which are increasingly used by competitors to provide innovative, high-bandwidth services to businesses; (4) adopting procedural rules to prevent incumbent LECs from gaming the forbearance process to their advantage and to ensure that the Commission does not grant unwarranted forbearance from unbundling and dominant carrier regulation of business broadband services; (5) adopting rules to ensure that all broadband competitors are subject to the same pole attachment rates; and (6) clarifying that incumbent LECs must directly interconnect their IP-voice networks with those of competitors. Together, these changes will place the U.S. on a firm footing for the future deployment of affordable broadband to businesses.

II. IN DEVELOPING A NATIONAL BROADBAND PLAN, THE COMMISSION SHOULD ADHERE TO THREE BASIC PRINCIPLES.

The *Notice* seeks comment on, among other things, "the elements that should go into a national broadband plan,"[3] "the role of regulation in broadband infrastructure and service markets"[4] and "the interplay between consumer welfare and the market generally."[5] In developing a national broadband plan, the Commission should follow three basic principles regarding regulatory intervention. *First*, wherever possible, policymakers should rely on the market without any government intervention because the market will yield the most efficient outcomes. This is a basic tenet of FCC and government policy and should not be controversial.

Second, in circumstances where market forces alone are unlikely to yield sufficient deployment and innovation or sufficiently low prices, the Commission should rely in the first instance on regulations that lower the barriers to competitive entry. By narrowly targeting regulations to the elimination of barriers to entry and enabling competition in those aspects of the business that are suitable for competitive supply, the Commission can minimize regulation while at the same time relying on private firms, rather than the government, to drive investment decisions. In the case of the business broadband market, such regulations include unbundling

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[3] *Id.* ¶ 8.

[4] *Id.* ¶ 37.

[5] *Id.* ¶ 69.

requirements and regulations to ensure reasonable special access prices. This principle requires consideration of numerous important subsidiary issues, such as how to define insufficient deployment and innovation and insufficiently low prices. Moreover, proper implementation of this principle requires comprehensive information collection to enable the FCC to analyze the relevant broadband markets.

Third, if regulations that lower entry barriers yield insufficient deployment, innovation or affordability, and the FCC decides that it should subsidize broadband for certain customers, then the Commission should rely on narrowly targeted subsidies that are "portable" to the most efficient service provider. That is, the subsidy payment should go to any eligible service provider chosen by the customer as his or her broadband provider; incumbent LECs should not be the only class of service providers eligible to receive the subsidy. Furthermore, to the extent possible, subsidies for broadband should be based on income (or a proxy therefor) and targeted to residential customers who cannot afford service (just as the Lifeline and Link-Up programs are based on income and targeted to those who cannot afford telephone service).[6] The Commission should not utilize imprecise and inefficient wealth transfers to high-cost areas because such transfers subsidize service for customers who have the ability to pay cost-based prices. By targeting subsidies only to those residential customers who cannot afford the service, the FCC can keep the size of the fund for subsidizing broadband manageably small and minimize the distorting effect of subsidies.

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[6] *See id.* ¶ 54; *see also id*., Appendix ¶ 9 & n.33.

III. AS APPLIED TO BUSINESS BROADBAND, THESE BASIC PRINCIPLES REQUIRE TARGETED REGULATORY INTERVENTION TO SPUR DEPLOYMENT, INCREASE INNOVATION, AND LOWER PRICES.

In the *Notice*, the Commission seeks comment on how it should evaluate its existing policies "impacting competition among broadband providers," such as special access policies, as part of its development of a national broadband plan.[7] Competition is obviously the most efficient means of promoting deployment, innovation and lower prices for broadband, but broadband deployment and innovation stagnate and prices remain high where the incumbent LEC remains dominant in a market. To address this problem, the national broadband plan must include sound analytical frameworks for identifying broadband markets in which the incumbent LEC remains dominant and for imposing appropriate regulations (e.g., price cap regulation for special access and unbundling requirements) to spur competition in such markets. This is especially important in the business broadband market because the incumbent LECs' continued control over bottleneck loop facilities in this market threatens to severely impair broadband deployment, innovation and affordability for business customers.

A. The Commission Has Failed To Use A Stable And Rational Means Of Identifying Circumstances In Which Competition Cannot Be Relied Upon To Yield Sufficient Deployment, Innovation And Affordability In The Business Broadband Market.

With respect to the business broadband market, many of the FCC's policies for identifying markets in which the incumbent LEC retains market power have been a failure. *First*, the FCC has established a framework under which an incumbent LEC can be freed from price cap regulation of special access services without demonstrating that there is any actual competition in the relevant market. Specifically, in 1999, the Commission instituted pricing

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[7] *See id.* ¶ 50 & n.73.

flexibility rules under which an incumbent LEC can escape price cap regulation altogether in a metropolitan statistical area ("MSA") in which it satisfies so-called Phase II "competitive triggers."[8] The competitive triggers were adopted based on the premise that fiber-based collocations can serve as a reasonable proxy for competition in the provision of special access, including so-called special access channel terminations (i.e., loop facilities).[9] As the GAO has explained, the Commission determined that a certain level of collocation "was a good predictor that competitors had made significant, irreversible sunk investments in facilities, and indicated the likelihood that a competitor could eventually extend its own network to reach its customers."[10] There are many flaws associated with this prediction, the most obvious of which is that *collocations have no bearing on a carrier's ability to deploy loops*.[11] Rather, competitors use collocations almost exclusively to connect the competitors' interoffice transport facilities to loop facilities leased from incumbent LECs. In fact, competitors generally establish collocations

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[8] *See generally In re Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221 (1999) ("*Pricing Flexibility Order*").

[9] *See* GAO Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 3 (rel. Nov. 2006) ("*GAO Special Access Report*").

[10] *Id.*

[11] *See, e.g.,* Sprint Nextel Corporation's Comments In Opposition To The Petition Of The Embarq Local Operating Companies For Forbearance From the Contract Tariff Filing Requirements Of The Pricing Flexibility Rules, WC Dkt. No. 07-258, at 8-9 (filed Dec. 14, 2007) (arguing that the FCC's competitive triggers "were based solely on the number of carriers that had simply collocated at some large wire centers in the MSA – whether or not those collocations had competitive facilities that could or would be used for the provision of special access" rather than "on the number of competitors actually providing special access services to the building and cell sites in a particular MSA").

because it is uneconomic to self-deploy loop facilities.[12] As a result, incumbent LECs can and do satisfy the Phase II competitive triggers for loops without any proof that a competitor has deployed a single loop facility in the relevant MSA.

Not surprisingly, incumbent LEC special access services have been freed from price caps in MSAs across the country even though competition in the provision of broadband loop facilities to business customers has failed to materialize. Far from benefiting broadband customers, elimination of price caps has simply given the incumbents the opportunity to unilaterally increase prices for commercial customers. In fact, the GAO has found that incumbent LECs' special access prices are *higher* in MSAs where they have met one of the Phase II competitive triggers and have been freed from regulation than in MSAs where they remain subject to price caps.[13]

Second, the FCC has failed to effectively regulate the terms of incumbent LECs' special access contracts. As the record in the pending special access rulemaking proceeding demonstrates, incumbent LECs still own the only local transmission facilities needed to provide special access to many commercial buildings,[14] and competitive wholesalers can only fulfill a small portion of carriers' wholesale demand. Incumbent LECs exploit this control over loop facilities by (1) setting their *undiscounted* month-to-month rates above monopoly levels and

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[12] *See, e.g.,* Opposition of Time Warner Telecom Inc. et al., WC Dkt. No. 07-97, at 16-26 (Erratum filed Sept. 13, 2007).

[13] *See GAO Special Access Report* at 13.

[14] *See, e.g.,* Comments of Time Warner Telecom and One Communications, WC Dkt. No. 05-25, at 5-14 (filed Aug. 8, 2007) ("TWTC et al. Special Access Comments"); *see also* Complaint, *United States v. SBC Communications, Inc. and AT&T Corp.*, No. 1:05-CV-02102, ¶ 15 (D.D.C. Oct. 27, 2005); Complaint, *United States v. Verizon Communications Inc. and MCI, Inc.*, No. 1:05-CV-02103, ¶ 15 (D.D.C. Oct. 27, 2005).

offering so-called “discounted” rates in volume/term contracts at or close to monopoly levels;[15] and (2) including large penalties in volume/term plans that apply where a purchaser decreases the volume of special access purchased or the length of the long-term contract. Supra-monopoly level month-to-month prices leave large purchasers no choice but to enter into the volume/term agreements, and penalties for failing to meet the requirements of the volume/term agreements leave large purchasers no choice but to buy all or almost all of their special access needs from the incumbent. Thus, incumbent LECs are able to condition a competitor’s ability to purchase *any* special access service under a volume/term discount plan on the competitor’s consent to purchase *all or virtually all* of its special access service needs under the plan.

Third, the FCC has employed a flawed framework for determining the circumstances in which to eliminate dominant carrier regulation of incumbent LEC packet-switched business broadband services. The Commission has failed to conduct a market power or dominance analysis in determining whether to grant forbearance from dominant carrier regulation of packetized special access services. The FCC has held instead that, in light of the “emerging and changing” marketplace, it would “look more broadly at competitive trends” and that it would do

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[15] As explained by Dr. Joseph Farrell in the Commission’s special access rulemaking proceeding:

> [W]hen a monopoly offers proportional or relative discounts off its undiscounted prices in order to induce customers to agree to exclusionary provisions, it has an incentive to set the undiscounted price above even the monopoly level (because, rather than simply deterring demand, an increase above the monopoly level steers customers into the discount plans and also brings the discount prices closer to the monopoly level).

See Reply Declaration of Joseph Farrell On Behalf of CompTel, WC Dkt. No. 05-25, ¶ 4 (filed July 29, 2005).

so "without regard to specific geographic markets."[16] But the Commission has never explained how an "emerging and changing" national marketplace for packetized business broadband services is the proper measure of the competitive availability of the local special access inputs necessary for such services. Rather, the FCC has granted forbearance from dominant carrier regulation of non-TDM-based special access inputs on the basis that it was retaining dominant carrier regulation *for an entirely different service*: traditional TDM-based special access inputs.[17] The Commission reached such a conclusion even though the record in the broadband forbearance proceedings demonstrated that TDM-based special access inputs are not viable substitutes for non-TDM-based special access inputs.[18] In fact, as tw telecom has explained, long-term reliance on TDM-based special access inputs to provide Ethernet services would

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[16] *See, e.g., In re Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 20 (2007) ("*AT&T Broadband Forbearance Order*"); *In re Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 19478, ¶ 19 (2007) ("*Embarq & Frontier/Citizens Broadband Forbearance Order*"); *In re Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260, ¶ 23 (rel. Aug. 5, 2008) ("*Qwest Broadband Forbearance Order*").

[17] *See, e.g., AT&T Broadband Forbearance Order* ¶ 25; *see also Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. §160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, ILEC Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 16304, ¶ 110 (2007) ("*ACS Broadband Forbearance Order*"); *Embarq & Frontier/Citizens Broadband Forbearance Order* ¶ 24; *Qwest Broadband Forbearance Order* ¶ 28.

[18] *See, e.g.,* Opposition of Time Warner Telecom Inc. et al., WC Dkt. No. 06-125, at 16-18 (filed Aug. 17, 2006) (explaining in detail that it is often not economically feasible to offer Ethernet services using TDM-based special access inputs).

substantially reduce the size of tw telecom's addressable market,[19] and in turn, reduce the deployment of Ethernet services to businesses.

Notably, the FCC has been perfectly willing to undertake a market power analysis in circumstances in which it is not intent on deregulating regardless of market conditions. For example, in deciding to retain dominant carrier regulation of TDM-based special access inputs in the *ACS Broadband Forbearance Order*, the Commission did examine some of the factors typically included in a dominance analysis. It found that, by virtue of ACS' control of bottleneck local transmission facilities, "ACS would still have the incentive and ability to increase its rivals' costs by manipulating the terms and conditions under which it offered and provisioned [interstate special access] services,"[20] namely "TDM-based DS1 and DS3 special access services."[21] Had it undertaken a market power analysis for non-TDM-based special access services, the FCC would have reached the same conclusion it reached with regard to TDM-based services. Although packetized business broadband services such as Ethernet offer new and innovative features, they are delivered over exactly the same copper and fiber loops used to provide TDM-based services and the incumbent LECs retain overwhelming market power over such facilities.[22]

Fourth, as the Joint Commenters have explained at length in recent forbearance proceedings, the Commission has failed to conduct a coherent competition and consumer welfare analysis in its UNE forbearance decisions in several ways. The flaws in the FCC's analytical

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[19] *See* Reply Declaration of Graham Taylor on behalf of Time Warner Telecom Inc. ¶¶ 17-25, WC Dkt. No. 06-74 (filed Aug. 8, 2006).

[20] *See ACS Broadband Forbearance Order* ¶ 87 & n.247.

[21] *Id.* ¶ 110.

[22] *See, e.g.,* TWTC et al. Special Access Comments at 5-14.

framework for assessing incumbent LEC petitions for forbearance from unbundling regulations include: (1) the failure to utilize appropriate and consistent geographic markets; (2) the failure to conduct a separate assessment of the extent of competitive network deployment in different relevant product markets, particularly the residential and business markets; (3) the failure to assess market share separately in relevant product markets, most obviously in the residential and business markets and in the wholesale market; (4) the failure, in general, to ensure that forbearance will not result in supra-competitive prices; and (5) the failure to exclude both competition that relies on unbundled loops sold by incumbent LECs and competition that relies on resale when assessing the extent of facilities-based competition.[23] The Commission's existing analytical framework is therefore entirely disconnected from sound economic analysis.

Finally, the FCC's process for addressing forbearance petitions lacks a number of affirmative rules that would diminish the threat of harm to competition and consumer welfare posed by such petitions. While the Commission is currently reviewing the need for rules to govern the review of forbearance petitions, there are currently no rules setting forth the circumstances in which it is impermissible to withdraw a forbearance petition at the last minute. Instead, the Commission has in the past allowed petitioners to withdraw or narrow the scope of petitions at any time—typically when a petitioner learns that the requested relief will likely be denied—thereby eliminating any deterrence to filing unsupported petitions and artificially skewing the FCC's jurisprudence in favor of forbearance grants.[24] Most recently, Verizon

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[23] *See, e.g.*, "Factual and Legal Support for Competitors' Proposed UNE Forbearance Standard," at 2-8, *attached to* Letter from Thomas Jones, Counsel for One Communications Corp. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Apr. 14, 2009) ("Joint Commenters' April 14th UNE Forbearance Ex Parte Letter").

[24] *See* Comments of Time Warner Telecom Inc. et al., WC Dkt. No. 07-267, at 12-14 (filed Mar. 7, 2008) ("Joint Commenters' Forbearance Procedures Comments") (discussing last-minute

withdrew[25] its petitions for forbearance from unbundling regulations in Rhode Island and Virginia Beach three days before the FCC was, according to reports,[26] set to deny the petitions. In so doing, Verizon was able to dictate whether the Commission reached a decision regarding the issues raised in the proceedings, including whether the FCC should adopt a new standard proposed by the Joint Commenters and other competitors to assess incumbent LEC petitions for forbearance from unbundling obligations.[27]

The Commission has also failed to adjust its voting rules to account for the fact that a timely 2-2 vote under its current rules results in no agency action. As a result, a 2-2 deadlock that is not broken by the statutory deadline results in an unreviewable default grant of all of the relief requested, even if no commissioner actually supports this outcome.[28]

The FCC's forbearance process also lacks affirmative rules to ensure the orderly and timely submission of evidence in support of petitions. In particular, the FCC has permitted parties to file petitions that are supported by little factual or legal support and then wait until the

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(continued)

withdrawals of forbearance petitions by Level 3, Verizon and Qwest, and the negative consequences of such withdrawals generally).

[25] *See generally* Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed May 12, 2009).

[26] *See, e.g.*, Stifel Nicolaus, Telecom, Media & Tech Regulatory Report, "FCC Seems to Lean Against New Verizon UNE Relief Bid; Court Overhang Remains," at 1 (Apr. 28, 2009).

[27] *See generally* Letter from Andrew D. Lipman et al., Counsel for Alpheus Communications, L.P. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Mar. 26, 2009) ("Joint Commenters' March 26th UNE Forbearance Ex Parte Letter"); *see also generally* Joint Commenters' April 14th UNE Forbearance Ex Parte Letter.

[28] *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007) (holding that the grant of a forbearance petition by operation of law is not reviewable).

proverbial, or literal, eleventh hour to file data and legal arguments via ex parte letters.[29] Where this is the case, and in light of the statutory deadline for agency decisions on pending forbearance petitions, interested parties have little or no time to respond to the newly filed information and the Commission has little or no time to review and analyze such information. The Commission's decisionmaking suffers as a result.

Understandably, Acting Chairman Copps has expressed dismay at many of the procedural and substantive flaws described herein.[30] Indeed, under Acting Chairman Copps' leadership, the FCC has taken important initial steps toward addressing some of the more obvious problems with the existing regime (e.g., by circulating a draft order that would establish procedural rules

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[29] *See* Joint Commenters' Forbearance Procedures Comments at 9-11.

[30] Most recently, in response to Verizon's last-minute withdrawal of its Rhode Island and Virginia Beach UNE forbearance petitions, Acting Chairman Copps stated, "It just doesn't seem to be the way policy should be made." *See* Fawn Johnson, "Acting FCC Chairman Wants To Change Deregulatory Process," Dow Jones Newswires, May 13, 2009, *available at* http://www.totaltele.com/view.aspx?C=0&ID=445633. In the past, Commissioner Copps has summarized his concerns about the harms posed by the forbearance process as follows:

> Just consider the amount of resources the Commission has expended in the last 15 months working to adjudicate this matter. And this is not to mention the resources spent by numerous competitors with far less resources than the incumbent telephone company. Further the Commission's policy making was dictated largely by the petitioner. . . . And just imagine the wholly wasted resources had the petitioner decided to withdraw the petition at the eleventh hour as others have done when they were unhappy with the result. The Commission could have addressed some of the procedural flaws in the context of this Order but chose not to do so.

Statement of Commissioner Michael J. Copps, Concurring, *In re Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs*, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (2007) ("*6-MSA Order*"). *See also, e.g.*, Concurring Statement of Commissioner Michael J. Copps, *In re Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle MSAs*, Memorandum Opinion and Order, 23 FCC Rcd. 11729 (2008) ("*4-MSA Order*") (explaining the substantive flaws in "the test established in *Qwest-Omaha* and its progeny").

governing forbearance proceedings).[31] But until concrete changes are adopted, the Commission's flawed approach to the regulation of business broadband will continue to wreak havoc on competition and consumer welfare.

Indeed, each of the flaws in the Commission's existing regime for the economic regulation of business broadband results in real and substantial harm. The most obvious consequence is that competitors are denied access to reasonably priced inputs needed to expand the availability of and drive down prices for services such as Ethernet. For example, the Commission's failure to adequately regulate special access prices and its erroneous grant of forbearance to AT&T, Qwest and other incumbent LECs from dominant carrier regulation of non-TDM-based special access inputs have impeded deployment of Ethernet services and contributed to high Ethernet prices in the U.S. As BT has explained, retail Ethernet services are more widely deployed and typically lower priced in Europe than in the U.S.[32] BT has also explained that wholesale Ethernet access services are also cheaper in the United Kingdom than in the U.S.[33]

In addition, the FCC's flawed UNE forbearance framework resulted in the unwarranted elimination of statutorily-mandated unbundling of wholesale inputs used to serve business customers in the Omaha, Nebraska MSA. In particular, the Commission relied on the success of the incumbent cable company, Cox, in the residential voice market to predict that competitors

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[31] *See* FCC Items on Circulation, *available at* http://www.fcc.gov/fcc-bin/circ_items.cgi (last visited June 4, 2009).

[32] *See* Comments of BT Americas Inc., WC Dkt. No. 05-25, at 20 & n.63 (filed Aug. 8, 2007).

[33] *See id.* at 21; *see also* Comments of Time Warner Telecom, Inc., WC Dkt. No. 07-45, at 14 & n.24 (filed May 16, 2007) (comparing BT's wholesale Ethernet prices with those of incumbent LECs in the U.S.).

would achieve the same level of success in the business market.[34] But the record lacked any evidence that Cox was serving business customers that demand high-capacity loop and transport facilities to any significant degree.[35] In addition, the FCC predicted that Cox's success in the retail residential voice market would prevent Qwest from curtailing access to its loop and transport facilities.[36] Not surprisingly, these analytically flawed predictions have been proven to be incorrect. Rather than offering reasonable wholesale pricing for DS0, DS1, and DS3 loops, Qwest has offered a competitor, McLeodUSA, access to Qwest's loop facilities at special access rates (which are substantially higher than cost-based rates for UNEs).[37] As a result, McLeodUSA has "significantly curtail[ed]" service to small business customers in the Omaha MSA and at least one other competitor, Integra, decided not to enter the Omaha market.[38] Thus, as a result of the FCC's erroneous forbearance decision, businesses in the Omaha market have fewer providers from which they can purchase business broadband services than they otherwise would.

The lack of procedural rules in the FCC's forbearance process has had similar effects on the market for business broadband services. Specifically, the Commission's failure to timely

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[34] *See In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 66 (2005) ("*Omaha Order*").

[35] *See* Joint Commenters' April 14th UNE Forbearance Ex Parte Letter at 3.

[36] *See Omaha Order* ¶ 67; *see also id*. ¶¶ 79-81.

[37] *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Dkt. No. 04-223, at 4 (filed July 23, 2007).

[38] *See* Letter from William A. Haas, Vice President – Regulatory and Public Policy, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 6 (filed July 10, 2008).

break a deadlocked 2-2 vote on Verizon's broadband forbearance petition resulted in the default grant of the petition by operation of law and in turn, the unwarranted elimination of common carrier regulation of business broadband special access services such as Ethernet in the Verizon territories.[39]

B. The Commission Should Establish Sound, Predictable And Stable Analytical Frameworks For Determining Whether Market Forces Alone Yield Sufficient Deployment, Innovation And Affordability In The Business Broadband Market.

Unless the FCC fixes the flaws in its existing analytical frameworks, it will be unable to identify and rectify circumstances in which market forces alone yield sufficient deployment, innovation and affordability in the business broadband market. Accordingly, the agency should adopt the following recommendations.

1. Special Access

The FCC should adopt the dominance standard as the standard for determining whether to apply rate regulation to special access. Under Commission precedent, an incumbent LEC is "dominant" if it can "profitably raise and sustain prices above competitive levels and thereby exercise market power."[40] This is the appropriate standard because the *difference* between the price charged and the cost incurred by the incumbent LEC, not the price itself, is the best

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[39] *See generally* News Release, FCC, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law* (rel. Mar. 20, 2006).

[40] *In re Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area et al.*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15756, ¶ 83 (1997) ("*LEC Classification Order*"). The Commission has held that a firm can exercise market power in one of two ways: (1) raising prices by restricting its own output or (2) "rais[ing] prices by increasing its rivals' costs . . . through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer services." *See id.*

measure of a firm's market power. In order to make this market power assessment, the FCC should require incumbent LECs to provide comprehensive and reliable reports on their special access costs and revenues. If an incumbent LEC's profits are excessively high for a particular category of special access (e.g., DS1 channel terminations, DS1 mileage, DS3 channel terminations, DS3 mileage, and Ethernet services), the incumbent LEC should be subject to meaningful price cap regulation. The Commission should set the price caps for special access at a level that ensures a reasonable rate of return for incumbent LECs. In addition, the FCC should periodically reassess the incumbents' market positions (e.g., every five years) to determine the extent to which they have lost the ability to unilaterally set prices above cost.

The Commission should also limit incumbent LECs' opportunities to engage in exclusionary pricing practices by prohibiting anticompetitive terms and conditions included in volume/term special access agreements. In particular, the FCC should prohibit incumbent LECs from conditioning the availability of any discount off of standard tariffed pricing for any kind of special access on a commitment that is not reasonably related to the efficiencies yielded by the volume/term commitment.[41]

2. Unbundling And Copper Loop Retirement

The FCC must establish a new UNE forbearance framework to ensure that forbearance is not granted where there is no meaningful facilities-based competition to the incumbent LEC in

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[41] Here, "standard tariffed pricing" means any month-to-month or standard tariffed term or volume discount offer for special access services of any kind offered by the incumbent LEC. In addition, a condition is "reasonably related to the efficiencies yielded by the volume or term commitment that is at issue" if (1) the incumbent LEC can show that a purchaser's agreement to the condition directly and quantifiably results in a reduction in the costs of providing the special access services that are the subject of the increased discount; and (2) the discount offered in return for the purchaser's commitment to meet the condition causes the incumbent LEC to pass through to the purchaser at least 75 of its reduced costs. *See* TWTC et al. Special Access Comments at 48-50.

the business broadband market. The standard for unbundling is already well-established in the FCC's impairment rulemaking decisions, but that standard must be extended to the forbearance context in an appropriate manner. In particular, as the Joint Commenters have explained in detail in recent UNE forbearance proceedings, under the Commission's interpretation of impairment in the *TRO*[42] and the *TRRO*,[43] the presence of a single cable competitor is not sufficient to show that entry is economic for other competitors, and that, therefore, UNEs can be eliminated.[44] The experience of competitors in the post-forbearance Omaha market confirms this. Accordingly, consistent with the FCC's own interpretation of the impairment standard in its rulemaking proceedings, the Joint Commenters have proposed that forbearance from unbundling be denied unless there are *at least two* facilities-based wireline competitors to the incumbent LEC, each of which has a 15 percent market share, in the relevant product and geographic markets.[45]

The Commission should also establish rules to prevent incumbent LECs from unilaterally retiring copper loops because such facilities are an increasingly viable means of providing business broadband services. As some of the Joint Commenters have explained, the Commission has consistently found that competitors are impaired without access to copper loops needed to

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[42] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003) ("*TRO*"), *subsequent history omitted*.

[43] *In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2004) ("*TRRO*").

[44] *See* Letter from Thomas Jones, Counsel, One Communications Corp. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49, at 2-5 (filed Apr. 23, 2009).

[45] *See generally* Joint Commenters' March 26th UNE Forbearance Ex Parte Letter.

provide broadband services.[46] Moreover, as a result of evolving compression and transmission standards, competitors have been providing more innovative, higher bandwidth broadband services, such as Ethernet over copper, to business customers.[47] It is critical that competitors continue to have the ability to lease copper facilities from incumbent LECs in order to provide these services and thereby increase the available alternatives for businesses seeking broadband services. The FCC should therefore require incumbent LECs to seek prior approval for copper loop retirement, and, as part of the agency's review of retirement requests, interested parties should be given a meaningful opportunity to explain why such a request should be denied.

3. Forbearance Process

The FCC should adopt procedural rules governing the review of forbearance petitions to ensure that it does not, by action or inaction, eliminate unbundling and dominant carrier regulation of business broadband services where there is no justification for doing so. Most importantly, the FCC should adopt: (1) rules that require a party seeking to withdraw a forbearance petition to file a formal request for withdrawal and rules that set forth criteria for reviewing such requests (including a presumption against granting any request for withdrawal filed within 90 days of the one-year statutory deadline for ruling on a forbearance petition or after the circulation of a draft Order on the petition, whichever is sooner); (2) rules that establish an orderly process for the submission of information in a forbearance proceeding, including the requirement that a party file with its forbearance petition all information in its possession that it intends to rely on in support of the requested relief (except that a petitioner may subsequently file

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[46] *See* Reply Comments of Time Warner Telecom Inc. and One Communications Corp., RM-11358, at 6 & nn.3-4 (filed Apr. 2, 2007).

[47] *See id*. at 16-17 & nn.14-15.

additional information for the purpose of responding to specific arguments made by opponents of the petition or updating previously filed information); and (3) rules that interpret the word "deny" in Section 10(c) of the Act to mean that a timely 2-2 deadlocked vote by Commissioners constitutes a denial of the requested relief over which there is a deadlock and rules that establish a process for the release of an Order explaining the denial. These rules, as well as the others proposed by some of the Joint Commenters in the pending forbearance procedures rulemaking,[48] would limit, at least to some extent, the threat posed by forbearance petitions to competition in the business broadband market.

C. The Commission Should Take Other Targeted Actions To Lower Barriers To Entry Into The Business Broadband Market.

The FCC should address other means of lowering entry barriers into the business broadband market. *First*, the FCC must minimize the competitive distortions created by discriminatory pole attachment rates. As tw telecom has explained elsewhere, pole attachments are essential inputs for broadband deployment.[49] However, the FCC's current rules cause broadband competitors to pay vastly different pole attachment rates. More specifically, telecommunications carriers often pay as much as two to three times more than cable operators to use the same poles and provide many of the same broadband services.[50] Disparate treatment of broadband competitors in this manner serves as an impediment to broadband deployment.

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[48] *See* Joint Commenters' Forbearance Procedures Comments at 20-29.

[49] *See, e.g.,* Time Warner Telecom Inc., "White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services," at 3-5, *attached to* Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293 & RM-11303 (filed Jan. 16, 2007).

[50] *See, e.g., id*. at 9-10.

Therefore, the Commission must exercise its authority under Section 224(e) of the Act[51] to ensure that all pole attachments used to provide broadband Internet access are subject to a single, unified rate.[52] In particular, all competitors should pay the rate yielded by the FCC's existing cable formula.[53]

Second, the FCC should make clear that, under Section 251 of the Act,[54] incumbent LECs are required to interconnect their IP-voice network facilities directly with the IP-voice network facilities of competitors. Today, incumbent LECs often insist that competitors convert IP-voice traffic to legacy circuit-switched form before handing that traffic off to the incumbent LECs' networks. This is the case even where incumbent LECs have deployed their own IP-voice networks, thereby obviating the need for interconnection and traffic exchange to occur in TDM form.[55] In support of this practice, Verizon has essentially argued that the interconnection requirements in Section 251 do not apply to Verizon's IP-voice network.[56] But this is not so. Section 251(c)(2) permits requesting carriers to interconnect with an incumbent LEC's network

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[51] 47 U.S.C. § 224(e).

[52] *See, e.g.*, Comments of Time Warner Telecom Inc. et al., WC Dkt. No. 07-245, at 5-14 (filed Mar. 7, 2008).

[53] *See id.*

[54] 47 U.S.C. § 251.

[55] *See generally*, Joseph Gillan, Gillan Associates, "The Next Step for Next Generation Technology: Interconnecting Managed Packet Networks to Preserve Voice Service Quality and Competition" (June 2008), *available at* http://www.freetocompete.com/files/gillan_nextstep-nxtgen_2008.pdf ("Gillan Managed Packet Networks Paper"); *see also* Joe Gillan, Presentation to NARUC, "The Next Step for Next Generation Technology: Interconnecting Managed Packet Networks to Preserve Voice Service Quality and Competition" (June 2008), *available at* http://www.narucmeetings.org/Presentations/MACRUC%20-%20Gillan.pptm.

[56] *See* Opposition of Verizon, WC Dkt. No. 04-440, n.19 (filed Aug. 13, 2007).

"at any technically feasible point" regardless of the technology used to transport the traffic.[57] Moreover, requiring competitors to make unnecessary protocol conversions discourages investment in and broader deployment of packet-switched networks.[58] For this reason, the Commission must clarify that an incumbent LEC's obligation to establish direct interconnection under Section 251 includes the incumbent's duty to establish direct IP-to-IP interconnection between the incumbent's IP-voice network and a requesting carrier's IP-voice network.

IV. CONCLUSION.

For the foregoing reasons, the Joint Commenters urge the Commission to follow the basic principles described herein as it develops a national broadband plan and to adopt the recommendations discussed herein to promote deployment, innovation and affordability in the business broadband market.

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[57] 47 U.S.C. § 251(c)(2); *see* Letter from Daniel L. Brenner et al., Counsel for National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-440 et al., at 5 (filed Aug. 6, 2007) ("The fact that an ILEC is in the process of transitioning from a circuit-switched, copper-based network to an IP/packet/broadband/optical network does nothing to diminish the advantage of ubiquity or the potential exercise of market power over interconnection that would arise in the absence of regulation. For example, it should not be the case that an ILEC can avoid all Title II obligations, including interconnection obligations, merely by replacing a TDM switch with a packet switch. Under Section 251(c)(2), ILECs are required to permit interconnection where it is technically feasible. The statute contains no exception for IP/packet/broadband/optical technology and there is no reason for the Commission to create one, particularly considering the ongoing migration by ILECs and other providers to IP-based softswitch technology.").

[58] *See* Gillan Managed Packet Networks Paper at 13 ("It is stating the obvious to observe that broadband networks are advanced by interconnection policies that support efficient voice traffic exchange, including Managed Packet traffic meeting quality of service expectations of end users. Conversely, refusals to interconnect voice traffic on efficient terms by ILECs would impose costs on competitors and deter broadband deployment.").

Respectfully submitted,

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